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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EXPEDITED CONSIDERATION REQUESTED

NRG POWER MARKETING LLC

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

Docket No. NOR 42122

PETITION FOR INJUNCTIVE RELIEF

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Karyn A. Booth
Nicholas J. DiMichael
Sandra L. Brown
David E. Benz
THOMPSON HINE LLP
1920 N Street, N.W., Suite 800
Washington, DC 20036
202.263.4108
202.331.8330 (fax)

Attorneys for NRG Power Marketing LLC

May 25, 2010

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SURFACE TRANSPORTATION BOARD**

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PETITION FOR INJUNCTIVE RELIEF

Pursuant to 49 CFR § 1117.1 and 49 USC § 721(b)(4), Complainant NRG Power Marketing LLC (“NRG”) hereby petitions the Surface Transportation Board (“Board” or “STB”) for an order enjoining the defendant, CSX Transportation, Inc. (“CSXT”), from charging the common carrier tariff rates in CSXT-10048 for the transportation of coal in unit trains from CSXT’s interchange with the origin carrier Union Pacific Railroad Company (“UP”) in Chicago, IL to NRG’s Huntley and Dunkirk Generating Stations¹ pending a final decision by the Board on the rate reasonableness challenges set forth in NRG’s Complaint filed on May 18, 2010 in this docket. Additionally, NRG requests that the Board impose an interim transportation rate, as described further below, during the pendency of the rate case. NRG requests expedited consideration of this Petition because, as described herein, irreparable injuries are already being incurred by NRG as a result of CSXT-10048.

¹ NRG Power Marketing LLC, a wholly-owned subsidiary of NRG Energy, Inc., is the entity that engages in contracts with the railroads and is the initial payor of the freight costs for the transportation of coal to Huntley and Dunkirk. The term “NRG” will be used in this proceeding to refer to both entities.

I. SUMMARY OF ARGUMENT

The common carrier rates in CSXT-10048 represent a dramatic increase from the prior rates and are extraordinarily high for a long-distance movement of coal in unit trains. As a result, CSXT's tariff rates have led to a near-complete cessation of coal deliveries to Huntley and Dunkirk since the rates went into effect on April 1, 2010. Other than one unplanned train, no coal has moved under this tariff because the Stations have become uncompetitive in the New York State electric market. More importantly, as described in the verified statements attached to this Petition, under the CSXT tariff, little or no coal is likely to move for the duration of this proceeding, leading to a major sustained reduction in output at the Stations and massive irreparable injury to NRG in lost sales as well as additional harm to the public. As a result of the rates in CSXT-10048, NRG is suffering lost sales that would not be compensated under Board-ordered reparations; hence, the injury suffered by NRG is irreparable. Additional irreparable costs are being or may be incurred by NRG, and there are public interest concerns which also support granting the injunction.

The tariff rates in CSXT-10048 are \$28 per ton from Chicago to the Huntley Generating Station and \$27 per ton from Chicago to the Dunkirk Generating Station for unit train movements on CSXT of only about 475 miles to the Dunkirk Station and 525 miles to the Huntley Station, or more than 55 mills per ton mile.² These tariff rates result in revenue-to-variable cost ("R/VC") ratios of 368% for the Huntley Station and 388% for the Dunkirk Station, which are far above any coal rates prescribed by the Board in past cases. Largely as a result of

² In contrast, UP's rate, including fuel surcharge, from the PRB to Chicago is [[████████]] per ton mile. CSXT's tariff rate from Chicago to the plants is [[████████]] of UP's contract rate for the movement from the PRB to Chicago, even though the length of UP's haul from the PRB to Chicago is more than double that of CSXT's haul from Chicago to the plants. Farrow V.S. at 3-4.

the stratospheric level of the rates in CSXT-10048, NRG has drastically curtailed [[[REDACTED]]]³ operations at the Huntley and Dunkirk Stations if injunctive relief is not provided.

As these extraordinarily high tariff rates have virtually stopped coal deliveries to the Huntley and Dunkirk Stations, they are harmful to not only NRG but also, inexplicably, to CSXT itself, even though CSXT was warned by NRG that excessive rates would cause the plants to drastically curtail output [[[REDACTED]]]. Yet, CSXT published its punitive tariff levels despite that knowledge. No coal is moving and CSXT is losing revenue. The only explanation for the incredible level of the rates in CSXT-10048 is that CSXT is willing to forego coal revenue in the short term in order to both punish NRG for exercising its right to obtain a tariff rate and to bludgeon NRG into accepting CSXT's monopoly contract rate. The Board should not countenance this behavior, and should restrain CSXT's unlawful actions.

The traditional factors required for the granting of injunctive relief are all present in this case. Due to the loss of business, NRG is suffering irreparable harm as a result of the CSXT tariff rates. The extremely high level of the tariff rates compared to CSXT's variable costs of service show that NRG is likely to succeed on the merits of its rate reasonableness complaint. [[[REDACTED]]]
[REDACTED]]] Finally, CSXT would not be harmed by injunctive relief due to the make-whole provision described further in Section V.B., and no other party would be harmed either.

This Petition is supported by verified statements from the following persons:

³ Information in brackets [[]] is Highly Confidential and is redacted from the Public Version.

Bradley Kranz, the Director of Regulatory and Market Affairs NY for NRG Energy, Inc., describes the operation of the New York electric market and how NRG would suffer irreparable harm if no injunction is issued by the Board. ("Kranz V.S.")

Michael Evans, the New York Portfolio Director for NRG Energy, Inc., provides background information regarding the recent operations of the Huntley and Dunkirk Stations, including their coal burn and megawatt hour generation. He also explains the effect on Huntley and Dunkirk of the rail transportation rates in CSXT-10048, thus supporting the irreparable harm suffered by NRG if there is no injunction. Mr. Evans also describes the projected operations if the Board establishes an interim rate as requested by NRG in Section VI.A. of this Motion. ("Evans V.S.")

Mauricio Gutierrez, the Executive Vice President of Commercial Operations for NRG Energy, Inc., describes the circumstances surrounding NRG's contract negotiations with CSXT, including CSXT's knowledge that high tariff rates [[[REDACTED]]]. Mr. Gutierrez also explains the millions of dollars in lost gross margin that will be incurred by NRG if no injunction is forthcoming, thus supporting the irreparable harm that would be suffered by NRG. ("Gutierrez V.S.")

Virginia Farrow, the Director of Coal Transportation for NRG Energy, Inc., provides factual background for recent coal transportation to Huntley and Dunkirk. Ms. Farrow describes the lack of effective intermodal and intramodal competition for transportation of coal from Chicago to both generating stations, thereby showing that CSXT has market dominance over the movements. Finally, Ms. Farrow also explains that, absent an injunction, NRG projects very few coal deliveries to Huntley and Dunkirk under CSXT-10048. ("Farrow V.S.")

J. Andrew Murphy, the Executive Vice President and Regional President, Northeast for NRG Energy, Inc., describes the fiduciary duties of NRG to its shareholders in light of the impact of CSXT-10048 on delivered fuel costs at Huntley and Dunkirk. [[[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]]] ("Murphy V.S.")

Thomas D. Crowley, the President of the economic consulting firm L.E. Peabody & Associates, Inc., shows that NRG has a very high likelihood of success on the merits of its rate reasonableness claim, especially because the revenue to variable cost ("R/VC") ratios produced by the tariff rates in CSXT-10048 are far in excess of any recent coal rates prescribed by the Board. ("Crowley V.S.")

II. FACTUAL BACKGROUND OF OPERATIONS AT HUNTLEY AND DUNKIRK

A. Coal Transportation to Huntley and Dunkirk

The Huntley and Dunkirk Generating Stations are coal-fired electric generating stations located in Western New York State. Since 2003, coal from the Powder River Basin in Wyoming has been consumed at these two stations, with rail transportation provided by UP and CSXT in a joint-line movement. Interchange occurs at Chicago. The Huntley Station, located in Tonawanda, New York, consumes approximately 1.5 million tons of coal per year while producing 380 megawatts of power, enough electricity to power about 300,000 homes. The Dunkirk Station, located in Dunkirk, New York, consumes approximately 2.0 million tons of coal annually and produces 530 megawatts of power, enough electricity to power about 420,000 homes. Through the ownership and operation of Huntley and Dunkirk and other similar

facilities, NRG operates as a wholesale power generation company that participates in major competitive power markets in the United States. Farrow V.S. at 1-2; Kranz V.S. at 2.

B. Recent Negotiations for Transportation of Coal to Huntley and Dunkirk

Starting in late 2003, coal from the Powder River Basin was transported by rail to the Huntley and Dunkirk Stations under a joint contract between NRG, on the one hand, and the UP and CSXT, on the other, in joint-line service. The latest joint contract expired on March 31, 2010. Under that contract, UP and CSXT delivered loaded coal cars to the Huntley and Dunkirk stations and returned empty cars to the mines for reloading. In January 2009, NRG requested a contract rate proposal from UP and CSXT to establish a new joint contract governing the transport of PRB coal to Huntley and Dunkirk. For a number of months, NRG and the rail carriers engaged in negotiations over the terms of that contract. Farrow V.S. at 3-4; Gutierrez V.S. at 1-2.

The parties were unable to reach an agreement on a new joint contract. Consequently, in February 2010, NRG entered into a contract with UP for the transportation of coal in unit-train service from the Powder River Basin to the interchange with CSXT at Chicago, effective on April 1, 2010. After additional negotiations with CSXT failed to result in an agreement with that carrier for transportation from Chicago to the destinations, on March 11, 2010, NRG requested from CSXT, under AAR Accounting Rule 11, common carrier tariff rates for these movements from Chicago to the destinations, effective April 1, 2010. In response to NRG's request for the common carrier tariff rates, CSXT provided the common carrier Rule 11 tariff rates on March 25, 2010 at a level of \$28 per ton to the Huntley Station and \$27 per ton to the Dunkirk Station. Farrow V.S. at 3-4. CSXT's response to NRG's request for common carrier tariff rates was attached to the Complaint at Exhibit A.

C. The New York Electric Market and the Status of Huntley and Dunkirk as Merchant Power Plants

The competitive nature of the New York power market means that the Huntley and Dunkirk Stations are merchant power plants, in contrast to the situation in all other prior coal rate cases at the Board, which involved rate-based utilities. Unlike rate-based power plants, merchant power plants do not have a guaranteed market for their power, do not have captive retail or wholesale customers, and cannot make use of automatic fuel cost pass-through. Evans V.S. at 2. Instead, merchant plants vie with one another in competitive electric generation markets; they do not produce electricity, or “dispatch,” unless it is economically appropriate to do so. Kranz V.S. at 3-4. One of the most significant components of a generator’s daily energy offer that may determine whether or not it is selected to operate is its variable operating costs associated with its cost of fuel. Kranz V.S. at 4; Evans V.S. at 2. When faced with an increase in generation costs, merchant power plants cannot simply recover these increases from electricity consumers via rate hikes approved by a state agency. Farrow V.S. at 3-4.

The Huntley and Dunkirk Stations generate power and sell their output on a daily basis through a wholesale competitive procurement process required and conducted by the New York Independent System Operator (“NYISO”). Kranz V.S. at 2-4. New York created its current system of competitive power generation in 1997; prior to that date, New York’s private utilities and public power authorities owned and operated all aspects of the state electric system, including the generation and transmission of electricity, and the delivery of electricity to customers. Kranz V.S. at 3. The changes in 1997 meant the “unbundling” of electric supply and delivery. *Id.* The New York State Public Service Commission strongly encouraged utilities to divest their generation, and open access to transmission to all qualified parties. *Id.* With these

changes, the financial risks associated with capital investment in the grid was shifted from ratepayers to private developers. *Id.*

The price received by NRG for electricity generation at the Huntley and Dunkirk Stations is set by a competitive market that is administered by NYISO. *Kranz V.S. at 3-5.* NYISO uses an economic dispatch method to select dispatching units. Generators with the lowest operating costs (or short-run marginal costs) are dispatched ahead of others with higher operating costs. *Kranz V.S. at 3.* Electricity generators compete for the right to be dispatched by submitting a confidential offer into NYISO's day-ahead and real-time markets. *Id.* NYISO determines the dispatch order by ranking the generators according to offer price. *Kranz V.S. at 3-4.*

NYISO uses a uniform clearing price system to select and pay generators of electricity. NYISO designates the least-costly resources for dispatch until there is sufficient supply from the designated resources to meet total customer demand. The market-clearing price is set by the offer price of the supplier last designated to meet total customer demand. All selected suppliers are paid the market-clearing price. Suppliers not selected do not receive any payment in this market. The result is that the system dispatches the resources in a manner that minimizes total production costs. *Kranz V.S. at 4.*

To be paid in the energy market, the plant has to have been selected for dispatch. One of the most significant components of a generator's daily energy bid that may determine whether or not it is selected to operate is its variable operating costs associated with its cost of fuel. *Kranz V.S. at 4.* NRG's costs of generation have risen dramatically under CSXT-10048. Dispatch of Huntley and Dunkirk has been severely curtailed because generation costs generally exceed the NYISO clearing price. Under these circumstances, since April 1 Huntley and Dunkirk have rarely been dispatched by NYISO to operate. *Evans V.S. at 3-5.*

III. STANDARD OF REVIEW

In evaluating requests for injunctive relief under 49 USC § 721(b)(4), the Board applies a four-part test described in cases such as *Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977). *DeBruce Grain, Inc. v. Union Pacific Railroad Company*, STB Docket No. 42023, slip op. at 3 (n.7) (served April 27, 1998). To prevail on its Petition under this test, NRG must show: (1) it is likely to succeed on the merits; (2) it will be irreparably harmed in the absence of the requested relief; (3) issuance of the injunction will not substantially harm other parties; and (4) granting the injunction is in the public interest. *Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc.*, STB Docket No. 42110, slip op. at 2 (served Dec. 22, 2008) (“*Seminole*”). See also *Railroad Salvage & Restoration, Inc. and G.F. Weideman, Int’l, Inc.—Petition for Investigation and for Emergency Relief under 49 U.S.C. §721(b)(4)*, STB Docket No. 42107, slip op. at 2 (n. 5) (served June 30, 2008) (“*Railroad Salvage*”).

The injunctive relief test is “flexible.” If the “arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak.” *Estate of Coll-Monge v. Inner Peace Movement*, 524 F.3d 1341, 1349 (D.C. Cir. 2008). See also *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (noting that “[t]he injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits”).

In other words, the factors should be considered on a “sliding scale” such that they are “balanced against each other.” *Davenport v. International Brotherhood of Teamsters, AFL-CIO*, 166 F.3d 356, 360-61 (D.C. Cir. 1999). However, at least some showing of irreparable harm is

necessary, even if the other three factors support granting relief. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

As described below, NRG's Petition meets and, in fact, greatly exceeds the requirements of the injunctive relief test.

IV. NRG IS LIKELY TO SUCCEED ON THE MERITS OF ITS RATE COMPLAINT

A. CSXT is Market Dominant for Rail Transportation to Huntley and Dunkirk

The statutory rate reasonableness standard enforced by the Board only applies if the defendant railroad has market dominance over the transportation at issue. 49 USC § 10701(d)(1). Market dominance means "an absence of effective competition from other rail carriers or modes of transportation," and consists of two parts: quantitative market dominance and qualitative market dominance. 49 USC § 10707(a); *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company*, STB Docket No. 42056, slip op. at 9 (served March 24, 2003) ("TMPA").

Both quantitative and qualitative market dominance exist in this case. The fact of market dominance is dramatically confirmed by the events of the past eight weeks: in the time since CSXT-10048 went into effect on April 1, 2010, coal deliveries to Huntley and Dunkirk have completely ceased, other than one unplanned train. V.S. Farrow at 8-9. Despite the economic harm that it is suffering and the extraordinarily high rail rates to which it is subject, NRG has not made use of any other railroads or transportation modes for delivery of coal, because no effective alternatives exist.

1. CSXT has quantitative market dominance

Quantitative market dominance requires that the challenged rates equal or exceed 180% of the defendant railroad's variable costs of providing the transportation. 49 USC

§ 10707(d)(1)(A). Determination of a railroad's variable costs is now a fairly simple process because movement-specific adjustments to the Uniform Rail Costing System ("URCS") calculation are no longer permitted. *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 59-60 (served Oct. 30, 2006); *Kansas City Power & Light Company v. Union Pacific Railroad Company*, STB Docket No. 42095, slip op. at 1 (served May 19, 2008). As shown in the attached Verified Statement of Thomas Crowley, the rates in CSXT-10048 produce revenues greatly in excess of 180% of CSXT's variable costs. In particular, the Huntley tariff rate results in an R/VC ratio of 368% and the Dunkirk tariff rate results in an R/VC ratio of 388%. Crowley V.S. at 5.

Calculation of variable costs using URCS requires nine specific inputs based on the transportation at issue. Mr. Crowley determined eight of the nine inputs based on historical rail operations data provided by NRG. Crowley V.S. at 4. The ninth input, loaded movement miles, was determined using a common rail mileage program. Crowley V.S. at 4. Mr. Crowley's calculations show that CSXT has quantitative market dominance over the rail transportation at issue in this case.

2. CSXT has qualitative market dominance

Qualitative market dominance means there are no effective transportation alternatives for the transportation at issue. *TMPA*, slip op. at 9. CSXT is the only railroad that serves the Huntley and Dunkirk Stations. No other rail carrier can transport PRB coal from Chicago to either Huntley or Dunkirk and, therefore, there is no effective intramodal competition. Farrow V.S. at 4-5.

Similarly, there is no effective intermodal competition for transportation of PRB coal from Chicago to Huntley or Dunkirk. Trucking is not a viable alternative due to the volumes of

coal involved, the cost, environmental issues, trucking supply issues, community opposition, and other reasons. Farrow V.S. at 5. *See also West Texas Utilities Company v. Burlington Northern Railroad Company*, Docket No. 41191, 1 STB 638, 652 (1996).

Both Huntley and Dunkirk are located near Lake Erie, and a small portion of coal was historically delivered to Huntley and Dunkirk via lake vessel. Even this small amount of water transport to the Stations ceased as of 2005, however, and water transportation does not provide effective competition to CSXT rail transportation for numerous reasons. First, the ports at Huntley and Dunkirk were closed in May 2008 and January 2008, respectively, as confirmed in letters from the U.S. Coast Guard attached to the Verified Statement of Virginia Farrow. Second, the harbor channel at Dunkirk is of inadequate depth for coal vessels despite Coast Guard dredging in late 2009 by the U.S. Army Corps of Engineers.⁴ Third, the only water access to Huntley is through the narrow, short, and shallow Black Rock Lock, and virtually all Great Lakes vessels are too wide and/or long (or have excessive draft) for this lock.⁵ Fourth, even assuming that vessel deliveries were physically possible, there is insufficient capacity to meet the full needs of Huntley and Dunkirk for coal. Finally, the Great Lakes are closed for shipping for several months every winter due to ice. There is insufficient space at both Huntley and Dunkirk for NRG to store enough coal in stockpiles to last during the winter. Farrow V.S. at 5-8. For all of the above stated reasons, it is not physically possible for coal to be delivered via vessel to either the Dunkirk Station or the Huntley Station despite their location on the water. The very

⁴ This dredging was conducted by the Corps of Engineers after funds were obtained from Congress. The harbor is used by recreational and commercial boats among others. Farrow V.S. at 7.

⁵ Out of the several hundred vessels in the Great Lakes fleet, NRG is aware of only two that could physically fit through the lock while also meeting the Jones Act requirement of being U.S.-flagged. Farrow V.S. at 8.

fact that CSXT imposed such high rates on NRG indicates clearly that the carrier itself believed that it faced no effective competition.

In short, no effective transportation alternatives exist for transportation of PRB coal from Chicago to Huntley and Dunkirk. Therefore, CSXT has qualitative market dominance over this transportation. Indeed, if effective alternatives did exist, NRG would have already taken advantage of them over the past eight weeks.

B. There is a Substantial Likelihood that the Rates in CSXT-10048 will be Found Unreasonable By the Board

In its Complaint, NRG elected to challenge CSXT's tariff rates under the constrained market pricing principles ("CMP") of the *Coal Rate Guidelines – Nationwide*, Ex Parte No. 347 (Sub-No. 1), 1 ICC2d 520 (1985), as revised in subsequent decisions of the Interstate Commerce Commission and Board. Comparison of the rates in CSXT-10048 to rates challenged in other CMP cases dealing with coal transportation over the past fifteen years shows a very strong likelihood that the rates in CSXT's tariff will be found unreasonable by the Board.

The rates in CSXT-10048 produce R/VC ratios far in excess of the rates prescribed by the Board in all recent coal rate reasonableness cases. *Crowley V.S.* at 5-7. Evaluation of cases since 2004 (i.e., the last five years) shows that the R/VC ratios of prescribed rates have varied between 180% and 245% for 2010 movements of PRB coal. *Crowley V.S.* at 6.

It should be noted that, although Huntley and Dunkirk are located in the Eastern United States, this proceeding is much more akin to Western rate reasonableness cases than to Eastern cases. In contrast to operations from Eastern coal mines, rail service to Huntley and Dunkirk by CSXT under CSXT-10048 is quite simple – unit trains of uniform length originate at one location (the Chicago interchange with UP) and travel on a heavily-used CSXT corridor to destination. Rail operations to Huntley and Dunkirk avoid the mountainous terrain common to

Eastern coal-producing regions. See, e.g., *Duke Energy Corporation v. Norfolk Southern Railway Company*, STB Docket No. 42069, slip op. at 8 (served Nov. 6, 2003) (“*Duke-NS*”) (Board mentions the “relative expense to build transportation projects in the mountainous areas of the Eastern United States compared to projects located primarily in less mountainous areas of the West”). Moreover, operations to Huntley and Dunkirk also avoid the varying train lengths and dozens of shifting mine origins that proved problematic for modeling in recent Eastern cases. *Duke-NS*, slip op. at 30-35.

It is, therefore, highly unlikely that these challenged rates would be found reasonable by the Board. The highest R/VC ratio prescribed by the Board in coal rate cases evaluated by Mr. Crowley was 245%, or far below the 368% and 388% ratios produced by the CSXT tariff rates for Huntley and Dunkirk. *Crowley V.S.* at 6-7. In short, there is a substantial likelihood that NRG would succeed on the merits of its rate complaint, and the requested injunction is appropriate. *CSX Transportation, Inc. v. Williams*, 406 F.3d 667, 674 (D.C. Cir. 2005) (finding injunction warranted “especially in light of...[the] high likelihood of success on the merits”).

V. NRG WILL BE IRREPARABLY HARMED IN THE ABSENCE OF INJUNCTIVE RELIEF

During a normal rate reasonableness case at the Board, the complainant pays the tariff rates during the proceeding and, if the challenged rate is found unreasonable, the defendant railroad pays reparations to the complainant at the end of the case. Reparations consist of the difference between the challenged rate and the reasonable rate multiplied by the traffic carried by the defendant during the case. Typically, the complainant’s traffic volume during the proceeding does not significantly change from what it was prior to the proceeding. Hence, there are no lost sales and the only damages incurred, if any, are transportation rates paid in excess of the reasonable rate.

The situation at Huntley and Dunkirk is unique, however. Unlike all prior coal rate complainants, which involved rate-based power plants, Huntley and Dunkirk are merchant power plants and, thus, do not have a guaranteed market for their power, do not have captive retail or wholesale customers, and cannot make use of automatic fuel cost pass-through. Evans V.S. at 2. See Section II.C. above. Since the effective date of the CSXT's tariff, NRG has only received one coal shipment under CSXT-10048, which was an unplanned delivery, because the tariff rates render operations at Huntley and Dunkirk uneconomic. Farrow V.S. at 4. Dispatch of the two generating stations has dropped dramatically and has virtually come to a standstill since April 1, 2010, the date the new tariff rates went into effect. Evans V.S. at 4; Farrow V.S. at 4-5. The plants are currently projected to produce less than [[REDACTED]] megawatt hours of electricity in the period from April to December 2010 and only [[REDACTED]] megawatt hours during 2011, compared to April to December 2009 generation of [[REDACTED]] megawatt hours – a nearly [[REDACTED]] percent decrease. Evans V.S. at 4.

The reason for this massive decline in generation is straightforward. Prices for power in the current electric market in New York State are about [[REDACTED]]
[[REDACTED]]
[[REDACTED]]. Evans V.S. at 4. At the transportation rate levels that existed in March 2010, the cost to NRG to operate the plants was about [[REDACTED]]. Evans V.S. at 4-5. Thus, the Stations were able to produce and sell power in early 2010. *Id.* But largely due to CSXT's punitive tariff, the cost to NRG to operate the plants went from [[REDACTED]] to about [[REDACTED]] and far above the competitive price for power in 2010 and the price in 2011 as described in current broker bid sheets. Evans V.S. at 4-5.

Under CSXT's tariff, the injury is already being incurred by NRG – it is more than imminent. *Wisconsin Gas Company v. Federal Energy Regulatory Commission*, 758 F.2d 669, 674 (D.C. Cir. 1985) (for injunctive relief to be appropriate, the injury must be of “such imminence that there is a clear and present need for relief”). In 2010, earnings before interest, taxes, depreciation and amortization (“EBITDA”) at both Huntley and Dunkirk will be reduced, primarily because of lower dispatch partially driven by the CSXT tariff. Murphy V.S. at 2. [[
[REDACTED]
[REDACTED]
[REDACTED]] Murphy V.S. at 2-3.

If injunctive relief is not provided, dispatch of Huntley and Dunkirk will almost never occur, causing NRG to suffer lost gross margin. Evans V.S. at 3; Gutierrez V.S. at 3. Megawatt hours generated by Huntley and Dunkirk are projected to be approximately [[[REDACTED]]] less than generation in previous years if no injunction is issued. Evans V.S. at 4; Gutierrez V.S. at 2. At the same time, NRG will make little use of the tariff rates in CSXT-10048; NRG projects shipments totaling only about [[[REDACTED]]] tons from April 1, 2010 through the end of 2011. Gutierrez V.S. at 3; Murphy V.S. at 3-4. This represents a dramatic decline compared to the roughly 2.8 million tons delivered to the two plants in 2009 and the roughly 3.6 million tons delivered in prior years. Evans V.S. at 4; Farrow V.S. at 6. Based on this drastic reduction in electricity generation, NRG envisions that the gross margin from operations at Huntley and Dunkirk for the last nine months of 2010 will be only [[[REDACTED]]], compared to [[[REDACTED]]] if the interim ceiling rate proposed by NRG in this Petition is adopted by the Board. Gutierrez V.S. at 3. Likewise, 2011 gross margin is projected to be only [[[REDACTED]]] under the rates in CSXT-10048 as opposed to [[[REDACTED]]] if the injunction is granted.

Gutierrez V.S. at 3. These dramatic reductions in gross margin are a direct result of CSXT-10048 but would almost entirely not be recoverable as reparations if the rates in CSXT-10048 were found unreasonable by the Board. Without an injunction, NRG projects reparations would be less than [[REDACTED]], out of the roughly [[REDACTED]] of lost gross margin incurred by NRG, if the Board prescribes rates at the interim ceiling rate level. See Section VI.A and Gutierrez V.S. at 3-4. Therefore, an injunction is warranted.

Given the extremely minimal deliveries projected by NRG under CSXT-10048, there would be virtually no reparations due to NRG if and when the Board finds the challenged tariff rates to be unreasonable. Yet, this does not mean that NRG would suffer no damages in such a scenario – the high rates in CSXT-10048 would cause NRG to irretrievably lose power sales and gross margin due to NRG's dependence on rail service and the drastically curtailed operations at Huntley and Dunkirk. Gutierrez V.S. at 3-4; *Railroad Salvage*, slip op. at 4 (Board finds existence of irreparable harm and issues injunction where business could be “irretrievably lost” and shipper is rail dependent). Clearly, then, the loss incurred by NRG in the absence of injunctive relief is unrecoverable under the Board's current procedures, and an injunction is proper. As there would be no reparations payable to NRG for the vast majority of damages, reparations “would not provide an adequate remedy without an injunction.” *BP Amoco Chemical Company v. Norfolk Southern Railway Company*, STB Docket No. 42093, slip op. at 4 (served June 6, 2005). In other words, “adequate compensatory or other corrective relief” will not be available to NRG “in the ordinary course of litigation.” *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958).

Under the NYISO rules, the schedules and prices that a generator receives are set each day and the market is settled daily. Kranz V.S. at 5. There are no provisions that would allow

NRG to revise its offers and receive a different payment after the fact. *Id.* Therefore, NRG must continually submit daily bids that reflect its generation costs for that day and it would not be possible to go back and undo the economic harm that may be caused while a dispute, such as the one at hand here, plays out. *Kranz V.S.* at 5-6.

Finally, irreparable harm exists in this case due to the negative public interest impact that would result without injunctive relief. See Section VII below.

In this unique situation – where there are merchant plants that would not use the challenged tariff rates – NRG has put forth the “strong case” necessary to enjoin the challenged rates during the rate reasonableness proceeding. *Seminole*, slip op. at 3. Reparations would not provide compensation to NRG for the financial damages it would incur as a result of the rates in CSXT-10048 being effective during the rate case. *Cf. Sampson v. Murray*, 415 U.S. 61, 90 (1974) (“[T]he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury.”); *DeBruce Grain*, slip op. at 4 (n. 11) (Board notes that no irreparable harm exists where petitioners would eventually be entitled to damages from the railroad).

[[REDACTED]],
NRG will suffer irreparable harm without an injunction. In such a situation, the total monetary damages would be inadequate or difficult to ascertain. *CSXT v. Williams*, 406 F.3d at 673-674 (irreparable harm exists where monetary value cannot easily be determined). Moreover, even to the extent a portion of the injury to NRG may be specified, such loss constitutes irreparable harm because it “threatens the very existence” of the business at Huntley and Dunkirk. *Wisconsin Gas Company*, 758 F. 2d at 674. See also *Holiday Tours*, 559 F. 2d at 843 (n. 2); *Union Pacific Railroad Company – Abandonment in Fremont and Teton Counties, ID*, 6 ICC 2d 641, 648 (1990) (denying petition to stay earlier decision authorizing abandonment because “there is no

suggestion that the existence of any farms is threatened”); *Coalition for Common Sense in Government Procurement v. United States*, 576 F.Supp.2d 162, 168 (D.D.C. 2008) (economic harm is irreparable when it “is so severe as to cause extreme hardship to the business or threaten its very existence”).

The circumstances now before the Board are dramatically different from those in a recent rate reasonableness case where an injunction was also sought. In contrast to the NRG situation, the prior case involved: (1) a regulated utility; (2) no allegation of a dramatic decline in shipment volume under the challenged tariff; (3) damages to the complainant that would be compensated by reparations if the rates were found to be unreasonable; and (4) limited public interest justification for an injunction. The Board rejected the injunction request in that prior case, finding that a “strong showing” had not been made. *Seminole*, slip op, at 3. Conversely, (1) NRG operates in a competitive power market; (2) coal shipments to Huntley and Dunkirk have already collapsed; (3) NRG is incurring lost power sales daily, and these lost sales will not be compensated by reparations; and (4) there are strong public interest considerations favoring an injunction.

VI. INJUNCTIVE RELIEF WILL NOT HARM OTHER PARTIES

A. An Interim Rate Should be Set By the Board

An interim transportation rate should be used in place of the rates in CSXT-10048 during the pendency of this proceeding. The interim rate should be set at no higher than \$18.26 per ton to Huntley and no higher than \$16.68 per ton to Dunkirk, inclusive of fuel surcharges, for the movement of coal from the UP interchange at Chicago to the plants. *Farrow V.S.* at 9; *Gutierrez V.S.* at 3-4. These rates are 240% of CSXT’s variable costs of providing the service. Use of a 240% R/VC ratio is an extremely conservative figure, as NRG believes the evidence in this

proceeding will show the lawful maximum rate is actually far below 240% R/VC ratio. Indeed, NRG believes that a rate at 240% revenue to variable cost ratio is not reasonable, but is proposing an interim rate level of no higher than 240% R/VC only for the purposes of this Petition in light of the “likelihood of success on the merits” standard; the difficulty of developing SAC evidence at this early stage of the proceeding; and the extremely conservative nature of the proposed rate level in light of recent Board precedent. In proposing this interim rate level, NRG does not waive its right to argue for a lower maximum lawful rate, and indeed believes that a full Stand-Alone Cost analysis will show that a maximum reasonable rate should be prescribed substantially below this level.

Use of an interim rate of no higher than 240% of variable cost is appropriate for a variety of reasons. First, the most recent rate reasonableness decision of the Board where a coal rate was prescribed determined that the reasonable rate was approximately 240% during the first two years of the prescription, i.e., the period for which an injunction is likely to be in effect in this case. *Western Fuels Association, Inc. and Basin Electric Power Cooperative v. The BNSF Railway Company*, STB Docket No. 42088, slip op. at 4 (served June 5, 2009) (“*Western Fuels*”). In the first two full years of the rate prescription in *Western Fuels*, the prescribed rate was 247% of variable cost in 2005 and 230% of variable cost in 2006, for an average variable cost of 239%. *Western Fuels*, slip op. at 4. The rate in the *Western Fuels* decision was the very highest SAC rate recently set by the Board, so that it is “likely” that a reasonable rate to NRG would eventually be set at or below that level. Indeed, use of the *Western Fuels* case is an extremely conservative approach here, since *Western Fuels* involved a very short unit train movement from mine origin to plant destination, a configuration which is likely to result in a high SAC rate because origin and destination costs are spread over relatively few ton-miles.

Longer movements, such as the movement at issue here, are likely to result in substantially lower costs and therefore substantially lower SAC rates.

The use of an interim rate of no higher than 240% R/VC ratio gives CSXT up to a 33% premium on the jurisdictional threshold for this transportation. Indeed, NRG believes that the Board should prescribe an interim rate and a maximum reasonable rate well below a 240% R/VC ratio. In two recent rate cases at the Board, the prescribed rate was set exactly at the 180% R/VC jurisdictional threshold because the defendant railroads effectively stipulated that a Stand-Alone Railroad would develop a rate at or below that level. *Kansas City Power & Light Company v. Union Pacific Railroad Company*, STB Docket No. 42095, slip op. at 1 (served May 19, 2008); *Oklahoma Gas & Electric Company v. Union Pacific Railroad Company*, STB Docket No. 42111, slip op. at 1 (served July 24, 2009). As witness Crowley notes, the Board's decision in *Xcel*⁶, the only other recent decision that prescribed a maximum coal transportation rate using the stand-alone cost test, resulted in an R/VC ratio of just 194% for 2010. Crowley V.S. at 6. Again, this is well below the 240% ceiling figure advanced here.

B. CSXT Will Not be Harmed if an Injunction is Issued. Moreover, NRG Would Agree to Compensate CSXT if the Challenged Rates are Found Reasonable or the Rate Prescribed by the Board is Above the Interim Rate

CSXT will not be harmed by an injunction. As described in the attached verified statements, little or no coal will move for the pendency of this proceeding at the tariff rates. CSXT is losing, and will continue to lose, millions of dollars of revenue because the rates in the tariff exceed the level at which the plants can operate. Paradoxically, CSXT will in fact *gain* economically from the issuance of an injunction, since at least some coal will move at the lower rates suggested by NRG as interim rates.

⁶ STB Docket No. 42057, *Public Service of Colorado D/B/A Xcel Energy v. BNSF Railway Company* (served May 3, 2005).

Moreover, NRG would compensate CSXT if the challenged rates are found reasonable or if the rate prescribed by the Board is above the interim rate in effect during this proceeding. At the conclusion of the case, if the rates in CSXT-10048 are found reasonable, or if the rates prescribed by the Board are above the interim rates, NRG would pay to CSXT the difference between the rates that were paid and the tariff rates or any rates prescribed by the Board above the interim rate level but below the tariff rates. Of course, if the Board prescribes maximum reasonable rates below the interim rates, CSXT would owe reparations to NRG.

C. No Party Would Suffer Harm as a Result of Granting the Requested Injunction

As shown above, CSXT would not be harmed and would be protected from harm if the requested injunction is granted. Moreover, CSXT would enjoy additional revenue from increased coal deliveries if the injunction is granted. No other party would be negatively affected by the granting of injunctive relief; in fact, just the opposite is true: other parties would benefit from an injunction. The economy of Western New York would likely retain the benefits of the income flow from NRG and its employees. The New York electricity market would have more lower-priced power generation available for hot summer days and cold winter nights.

Murphy V.S. at 2-4; Evans V.S. at 5.

VII. GRANTING THE INJUNCTION IS IN THE PUBLIC INTEREST

[[[REDACTED]
[REDACTED]
[REDACTED]]] If the Board grants the requested injunction, benefits would flow to the public throughout the Western New York region. [[[REDACTED]

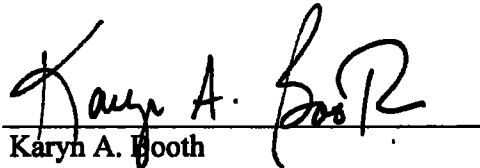
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■■ The New York electricity market would have more available power generation for hot summer days and cold winter nights. Evans V.S. at 5.

VIII. CONCLUSION

For the foregoing reasons, NRG respectfully requests that the Board (1) enjoin CSXT from charging the transportation rates in CSXT-10048 during the pendency of this proceeding; and (2) order that interim rates of no higher than \$18.26 per ton to Huntley and no higher than \$16.68 per ton to Dunkirk, inclusive of fuel costs, be utilized during the pendency of this proceeding for transportation of PRB coal from the Chicago interchange with UP.

Respectfully submitted,


Karyn A. Booth
Nicholas J. DiMichael
Sandra L. Brown
David E. Benz

THOMPSON HINE LLP
1920 N Street, N.W., Suite 800
Washington, DC 20036
202.263.4108
202.331.8330 (fax)

Attorneys for NRG Power Marketing LLC

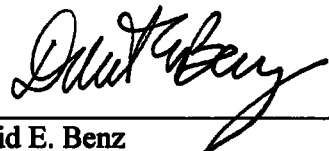
May 25, 2010

CERTIFICATE OF SERVICE

I certify that on this 25th day of May 2010, I caused a copy of the foregoing Petition for Injunctive Relief to be served by hand upon the following:

G. Paul Moates
Sidley Austin LLP
1501 K St. NW
Washington, DC 20005

Counsel for CSX Transportation, Inc.



David E. Benz

**VERIFIED STATEMENT OF
BRADLEY KRANZ**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NRG POWER MARKETING LLC)	
)	
Complainant,)	
)	
v.)	Docket No. NOR 42122
)	
CSX TRANSPORTATION, INC.)	
)	
Defendant.)	

VERIFIED STATEMENT OF BRADLEY KRANZ

1. My name is Bradley Kranz. I am the Director of Regulatory and Market Affairs NY, NRG Energy, Inc., 211 Carnegie Center, Princeton, New Jersey. NRG Power Marketing LLC ("NRG") is a wholly owned subsidiary of NRG Energy, Inc. ("NRG Energy"). I am responsible for representing NRG Energy in regulatory and market related matters for its assets in New York State. I am submitting this Verified Statement in support of NRG's petition for injunctive relief against CSX Transportation, Inc. ("CSXT") in this proceeding. The purpose of this Verified Statement is to present facts related to the sale of electricity in New York State and the market for electric power in New York State. NRG is the entity that engages in contracts with the railroads and is the initial payor of the freight costs for the transportation of coal to Huntley and Dunkirk. In the remainder of my Verified Statement, I will simply use the term "NRG" to describe both NRG Power Marketing LLC and NRG Energy, Inc.

2. NRG is a wholesale power generation company. Among other electric generating facilities in New York, NRG owns and operates the Huntley and Dunkirk Generating Stations, coal-fired electric generating stations located in western New York. NRG acquired the stations

from Niagara Mohawk Power in June 1999, and has continually invested in these facilities since that time to enhance their performance and environmental profile. As an independent power producer in New York, NRG's plants operate as a merchant supplier of electricity in the competitive wholesale energy market. This means that unlike a traditional regulated utility owned generator that is guaranteed recovery of its prudently incurred costs by the state regulators that set their rates, any costs that NRG's plants face cannot simply be passed on to ratepayers to ensure their recovery. Accordingly, NRG is responsible for all costs of coal transportation to Huntley and Dunkirk. As I will explain here in my affidavit, NRG's ability to recover these costs are unquestionably tied to its generators being a lower cost resource as compared to other generators in the market, in order for them to be selected to operate and be paid.

3. The Huntley Generating Station is located in Tonawanda, New York, near Buffalo. The current station, which began commercial operation in 1957 and 1958, has been modernized and is now comprised of two coal-fired units generating a total of 380 megawatts. This is enough electricity to power approximately 300,000 homes. The station is a key power producer in the western New York energy market and sells its output on a daily basis through a wholesale competitive procurement process that is conducted by the New York Independent System Operator ("NYISO"). The facility employs 115 full time employees.

4. The Dunkirk Generating Station is located on an 83-acre site at the Dunkirk city harbor on Lake Erie. NRG's Dunkirk Generating Station is capable of producing up to 530 MW of electricity with its four units. This is enough electricity to power approximately 420,000 homes. The facility sells its power through the same daily wholesale procurement process via the NYISO as the Huntley Station. The facility employs 149 full time employees.

5. Prior to the restructuring of the electric industry in the 1990s, New York's private utilities and public power authorities owned and operated all aspects of New York's electric system. This included the generation and transmission of electricity, as well as the delivery of electricity to customers. Rates were regulated by the public service commission, and the price of fuel was passed through to local customers. In 1997, the New York State Public Service Commission ("PSC") ordered the "unbundling" of electric supply and delivery, strongly encouraging utilities to divest their generation and open access to transmission to all qualified parties. This shifted the financial risk of capital investment in the grid from ratepayers to private developers.

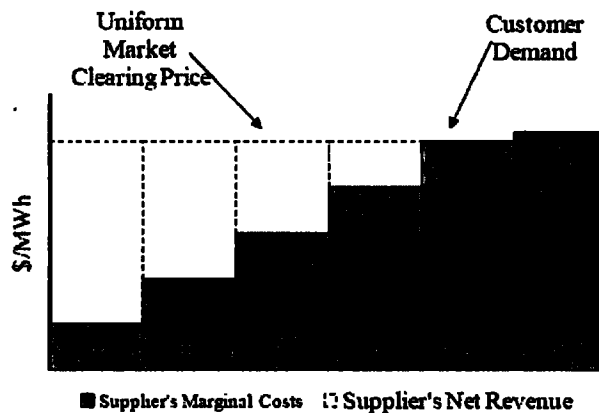
6. Since December 1, 1999, the NYISO has been responsible for administering the operation of the wholesale competitive electric market in which the Huntley and Dunkirk Stations participate. This means that electric service areas are not the province of a particular electric utility, and there are no dedicated markets or captive customers; rather electric generating companies compete against one another to sell electricity in New York. The price of electricity is set by the competitive market, not by a state or local public service commission, and there is no fuel pass-through.

7. In a competitive environment, power suppliers like NRG are not paid for their produced energy unless their stations generate power. Power stations are only chosen by the NYISO to generate energy if their output is competitively priced. The NYISO uses an "economic dispatch" methodology in which generators with the lowest operating costs (or short-run marginal costs) are dispatched ahead of others with higher operating costs. In the NYISO, suppliers compete for the right to be dispatched by submitting a confidential offer into the NYISO's day-ahead and real-time markets. The NYISO determines the dispatch order by

ranking the generators according to offer price. To be paid in the energy market, the station has to have been selected for dispatch. One of the most significant components of a generator's daily energy offer that may determine whether or not it is selected to operate is its variable operating costs associated with its cost of fuel. NYISO guidelines that control what a generator may offer are found in the Market Services Tariff, which has been approved by the Federal Energy Regulatory Commission, in Attachment H, Section 3.1.4 – Reference Levels, and Section 3.3 – Consultation with a Market Party.¹

8. Figure 1 below illustrates how NYISO uses a uniform clearing price system to select and pay suppliers. As shown in the figure, NYISO ranks the offers from the six suppliers (Suppliers A through F) according to their offer prices. The NYISO designates the least-costly resources for dispatch until there is sufficient supply from the designated resources to meet total customer demand. The market-clearing price is set by the offer price of the supplier last designated to meet total customer demand. All selected suppliers are paid the market-clearing price. Suppliers not selected do not receive any payment in this market. The result is that the system dispatches the resources in a manner that minimizes the cost to supply the total demand in New York State. To the extent that NRG's operating costs are increased due to higher fuel related costs, its offers will be similarly increased. The result is that it will move the station to the "right" in the ranking and adversely impact the economics of the station and the margins it relies on to support continued operations and fund ongoing expenses such as maintenance, taxes, and employee salaries. If those costs are high enough, the station would be more expensive than the market clearing price and it will not be selected to operate at all and will receive no revenues from energy production.

¹ www.nyiso.com/public/webdocs/documents/tariffs/market_services/ms_attachments/att_h.pdf

Figure 1: Uniform-Clearing-Price Market

9. As the example above demonstrates, generators in the New York market are competing with each other to generate power and only the lowest cost resources that are necessary to meet the demand will be selected. Therefore, the higher the offer, the more likely the generator is priced out of the market and will receive no payment from the NYISO. To avoid being shut out of the market entirely, a generator needs to submit offers that are as low as possible, but can reasonably do so only down to the level at which the offer reflects its costs. Any lower, and if the generator is selected it could be operating at a loss. That is because when a generator is selected, the NYISO only provides a payment guarantee based on the submitted offer, and not its actual costs which are assumed to be accounted for in that offer. Under the NYISO rules, the schedules and prices that a generator receives are set each day and the market is settled daily. There are no provisions that would allow NRG to revise its offers and receive a different payment after the fact. Therefore, NRG must continually submit bids each day that reflect its costs as it knows them on a given day and it would not be possible to go back and recoup any lost revenues and undo the economic harm that may be caused while a dispute, such

as the one at hand here, plays out. Moreover, NRG will not bid the Huntley and Dunkirk Stations at a sustained and significant loss based on NRG's belief that the litigation outcome in the rate reasonableness case against CSXT would end favorably.

10. It is for the reasons described herein why the relief that NRG is seeking is needed at this time. The increased costs associated with the rail transportation charges have a significant and immediate adverse impact on the Huntley and Dunkirk schedules, and therefore payments, in the NYISO market with each passing day. Additionally, the economic harm associated with this outcome cannot be undone after-the-fact under the NYISO's FERC approved tariff and market rules.

VERIFICATION

I, Bradley Kranz, verify under penalty of perjury that I have read the foregoing
Verified Statement, that I know the contents thereof, and that the same are true and correct to the
best of my knowledge. Further, I certify that I am qualified and authorized to file this statement.


Bradley Kranz

**VERIFIED STATEMENT OF
MICHAEL EVANS**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NRG POWER MARKETING LLC)	
)	
Complainant,)	
)	
v.)	Docket No. NOR 42122
)	
CSX TRANSPORTATION, INC.)	
)	
Defendant.)	
)	

VERIFIED STATEMENT OF MICHAEL EVANS

1. My name is Michael Evans. I am the New York Portfolio Director, NRG Energy, Inc., 211 Carnegie Center, Princeton, NJ. NRG Power Marketing LLC ("NRG") is a wholly owned subsidiary of NRG Energy, Inc. ("NRG Energy"). I am responsible for the commercial operations of all of NRG Energy's New York Generating Portfolio. The New York Portfolio has over 4,000 MWs, enough electric power to supply 3.2 million households, with coal-fired generation in Western New York, oil-fired generation in Central New York and gas and oil-fired generation in New York City. I am submitting this Verified Statement in support of NRG's petition for injunctive relief against CSX Transportation, Inc. ("CSXT") in this proceeding. The purpose of this Verified Statement is to present facts related to the current production of electric power by the Huntley and Dunkirk Generating Stations and the projected production of electric power after the imposition by CSXT of tariff rates effective April 1, 2010.

2. NRG Energy is a wholesale power generation company with a significant presence in major competitive power markets in the United States. NRG Energy is engaged in the ownership, development, construction and operation of power generation facilities, the

transacting in and trading of fuel and transportation services, and the trading of energy, capacity and related products in the regional markets in the United States and select international markets where its generating assets are located. NRG is the entity that engages in contracts with the railroads and is the initial payor of the freight costs for the transportation of coal to Huntley and Dunkirk. In the remainder of my Verified Statement, I will simply use the term “NRG” to describe both NRG Power Marketing LLC and NRG Energy, Inc.

3. As other witnesses have detailed, NRG owns and operates the Huntley and Dunkirk Generating Stations, coal-fired electric generating stations located in western New York. The Stations are “merchant” plants which means that they have no guaranteed market for their power, no captive retail or wholesale customers, and no fuel pass-through. They sell power, if at all, only if they can compete in the electric market in New York State against other generating stations in New York and surrounding regions. These Stations compete against other electric generating stations, including gas-fired, oil-fired, nuclear, hydro, wind and other coal generating stations. The delivered price of coal (fuel) is the key variable that determines whether a generating unit will generate electricity on a given day. There is a direct correlation between the price of coal and rail transportation used by the plant and electricity generation at the plants and the profits to NRG of that generation.

4. As discussed in Brad Kranz’s Affidavit, the NYISO uses an “economic dispatch” methodology in which generators with the lowest operating costs (or short-run marginal costs) are dispatched ahead of others with higher operating costs. The Huntley and Dunkirk Generating Stations’ main competition in the economic dispatch process are the natural gas-fired units, as coal and natural gas-fired units generally represent the last unit of generation picked up in an economically dispatched market, thus they are referred to as the marginal fuel. Generally, the

delivered cost of coal must be significantly less than the delivered cost of natural gas for the Huntley and Dunkirk Stations to be competitive, as natural gas stations are generally more efficient and have less emission costs than the Huntley and Dunkirk units. The delivered cost of coal must be below that of natural gas because natural gas generating units are located closer to the main load center in Southeastern New York and will suffer less line loss and congestion¹.

5. Prior to CSXT's imposition of tariff CSXT-10048, the Huntley and Dunkirk units were economic and being dispatched by the NYISO on a daily basis. Since the imposition of tariff CSXT-10048, the Huntley and Dunkirk units are no longer competitive with gas units and economic dispatches for Huntley and Dunkirk units by the NYISO have been drastically reduced. The Huntley and Dunkirk units will only be economic now after the gas-fired units have dispatched first, which will only happen on high load days (*i.e.*, an extremely hot summer day) or when other generating unit(s) are on outage. The Huntley and Dunkirk units have essentially been displaced in the economic dispatch process by gas units due to the higher coal transportation costs.

6. NRG makes a gross margin for the Huntley and Dunkirk units each day that it is selected by the NYISO in the economic dispatch process. NRG loses this gross margin each day the Huntley and Dunkirk units are not dispatched. Currently, dispatch is drastically curtailed due in large part to CSXT's imposition of tariff CSXT-10048. NRG has no way to recoup these lost margins if the Huntley and Dunkirk units are not dispatched by the NYISO. The Huntley and Dunkirk units would have remained competitive if not for CSXT's imposition of tariff CSXT-10048.

¹ "Line losses" consist of the amount of generation lost along the path to load due to heat dissipation. In New York, about 2.5% of energy is consumed by losses. Meanwhile, "congestion" means that dispatching the least costly generation may result in exceeding transmission line limitations.

7. In the 2006 to 2008 time period, the two Stations had a combined burn of about 3.5 million tons of coal per year. This coal has been used to generate an average of about 6 million megawatt-hours of electricity per year in those years. In 2009, the Stations burned 2.8 million tons of coal, in the process generating 4.4 million megawatt-hours of electricity. Decreased generation in 2009 was driven by reduced demand and lower natural gas prices.

8. The generation of electricity by the Huntley and Dunkirk Stations has changed drastically with CSXT's imposition of tariff CSXT-10048, which sets a rate of \$27 per ton to the Dunkirk Station and \$28 per ton to the Huntley Station effective April 1, 2010. Economic dispatch of a particular unit is based upon multiple components, and the primary cost factor is delivered fuel price, which is currently about [[REDACTED]]. NRG cannot generate electricity at competitive prices under the CSXT tariff. As of the date of this Verified Statement, the dispatches for the Stations have been drastically reduced, and assuming the CSXT tariff remains in effect, are now projected to produce less than [[REDACTED]] megawatt-hours of electricity April – December 2010 and [[REDACTED]] megawatt hours of electricity in 2011. This severely contrasts with April – December 2009 generation of 3 million megawatt hours, April – December 2008 generation of 4.5 million megawatt hours and April – December 2007 generation of 4.3 million megawatt hours. Forward power prices in the April-December 2010 electric market in New York State are about [[REDACTED]] per megawatt hour for around the clock power and about [[REDACTED]] per megawatt hour for around the clock power in 2011. These prices are compiled as of April 30, 2010 from four independent broker quotes [[REDACTED]] At the rail rate levels that existed in March 2010, before the tariff increase took effect, the cost to NRG to operate the Stations was about [[REDACTED]]


■■■■]] per megawatt hour. Thus, at rail rate levels that existed before the tariff increase, the Stations produced and sold power.

9. There has been a drastic decrease in electricity generation since April 1 and projected forward the cost to NRG to operate the Stations went from approximately [[■■■■]] per megawatt-hour to roughly [[■■■■]] per megawatt-hour, an over [[■■■■■■■■■■]] increase and far above the competitive market price for power. CSXT's tariff was a significant factor in reducing the Stations from a competitive position to a position where they could not generate power at the current market price.

10. If the STB grants an interim rate at the level requested by Witness Farrow, generation for the April – December 2010 period is projected to be approximately [[■■■■■■■■■■]] megawatt hours, an increase of about [[■■■■]], and approximately [[■■■■■■■■■■]] megawatt hours in 2011, an increase of about [[■■■■]]

VERIFICATION

I, Michael Evans, verify under penalty of perjury that I have read the foregoing
Verified Statement, that I know the contents thereof, and that the same are true and correct to the
best of my knowledge. Further, I certify that I am qualified and authorized to file this statement.


Michael Evans

**VERIFIED STATEMENT OF
MAURICIO GUTIERREZ**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NRG POWER MARKETING LLC)	
)	
Complainant,)	
)	
v.)	Docket No. NOR 42122
)	
CSX TRANSPORTATION, INC.)	
)	
Defendant.)	
)	

VERIFIED STATEMENT OF MAURICIO GUTIERREZ

1. My name is Mauricio Gutierrez. I am the Executive Vice President, Commercial Operations, NRG Energy, Inc., 211 Carnegie Center, Princeton, New Jersey. NRG Power Marketing LLC ("NRG") is a wholly owned subsidiary of NRG Energy, Inc. ("NRG Energy"). I am responsible for the commercial management of NRG Energy's domestic asset portfolio as well as the real time operations, origination and structuring for the Company. I previously served as Senior Vice President Commercial Operations and Vice President, Trading for NRG Energy. I am submitting this Verified Statement in support of NRG's petition for injunctive relief against CSX Transportation, Inc. ("CSXT") in this proceeding and to present facts related to the gross margin loss that will be suffered by NRG as a result of the imposition by CSXT of tariff rates effective April 1, 2010; and the irreparable harm that such tariff rates will cause NRG.

2. NRG Energy is a wholesale power generation company with a significant presence in major competitive power markets in the United States. NRG Energy is engaged in the ownership, development, construction and operation of power generation facilities, the transacting in and trading of fuel and transportation services, and the trading of energy, capacity

and related products in the regional markets in the United States and select international markets where its generating assets are located. NRG Energy owns and operates the Huntley and Dunkirk Generating Stations, coal-fired electric generating stations located in western New York, whose fuel is transported by CSXT. NRG is the entity that engages in contracts with the railroads and is the initial payor of the freight costs for the transportation of coal to Huntley and Dunkirk. In the remainder of my Verified Statement, I will simply use the term “NRG” to describe both NRG Power Marketing LLC and NRG Energy, Inc.

3. In several meetings or conversations with CSXT, I conveyed that Huntley and Dunkirk Stations are “merchant” plants that did not have a guaranteed market for their electric output and that the competitive market was extremely sensitive to changes in fuel costs. An excessive rail transportation rate would result in drastic curtailment of power generation at the Stations. I advised CSXT that NRG had entered into a contract with Union Pacific Railroad to transport coal from the Powder River Basin to the Chicago interchange with CSXT and requested reconsideration of CSXT’s rate proposal.

4. Witnesses Evans and Farrow have detailed the effect on the Huntley and Dunkirk Stations’ coal consumption and electric production as a result of the Stations’ inability to participate in the competitive electric market in New York as a direct result of the unreasonable rates in CSXT’s Tariff 10048.

5. The loss of electric generation from the Huntley and Dunkirk Stations will have an irreparable effect on NRG’s gross margin¹, which cannot be made up through the payment of

¹ “Gross margin” is defined as revenue generated from power sales less the delivered cost of fuel. As such, all other expenses, i.e., operations and maintenance, labor, and emissions costs, to name a few, are excluded from gross margin calculations.

reparations. As detailed by Witness Evans, power generation is projected to be [[REDACTED]] of historic levels at the Stations.

6. As further detailed by Witness Evans, NRG's projected generation at the CSXT tariff rates will generate a gross margin from the plants of only about [[REDACTED]] in the last nine months of 2010 and only [[REDACTED]] during calendar year 2011. In contrast, if the through rates to NRG were [[REDACTED]] per ton to Dunkirk and [[REDACTED]] per ton to Huntley (i.e., a UP rate of [[REDACTED]] from the PRB to Chicago and a CSXT rate of 240% R/VC or \$16.68 per ton to Dunkirk and \$18.26 per ton to Huntley from Chicago, inclusive of fuel surcharges), the gross margin to NRG would total [[REDACTED]] for April through December 2010 and [[REDACTED]] for calendar year 2011. In other words, NRG will suffer gross margin losses as a result of CSXT's excessive tariff of nearly [[REDACTED]] in the last nine months of 2010 (i.e., the difference between [[REDACTED]]) and nearly [[REDACTED]] in 2011 (i.e., the difference between [[REDACTED]]). Total lost gross margin for the remainder of 2010 and 2011 will approximate [[REDACTED]] The only variable that changes in these calculations is CSXT's transportation rate.

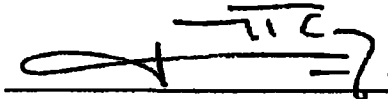
7. The harm to NRG from the CSXT Tariff 10048 is irreparable. I understand if NRG prevails in its complaint proceeding before the STB, NRG would obtain reparations for the difference between the tariff rate that NRG has paid and the rate that the Board determines to be "reasonable" at the conclusion of the litigation. I also understand that the Board will prescribe a reasonable rate for a ten-year period for the future. However, NRG's reparations will be minimal, because NRG projects approximately 90,000 tons of coal will be shipped at the rates charged under CSXT's tariff through 2011. I understand that reparations paid by CSXT cannot include a payment to NRG for lost gross margin as a result of NRG's inability to generate power

at competitive prices because of CSXT's extremely high tariff rates. Reparations will not address the harm suffered by NRG, nor will NRG be able to recoup its losses. At a prescribed rate of 240% R/VC, or \$16.68 per ton to Dunkirk and \$18.26 per ton to Huntley, reparations would be less than [[██████████]] leaving NRG with [[██████████]] of irrecoverable lost gross margin.

8. Because power cannot be stored, NRG cannot generate power now and sell it later at competitive prices when a reasonable rate is prescribed. Thus, NRG can never make up for sales lost now. Moreover, NRG cannot simply ignore the price that CSXT is charging for transporting the coal and sell electricity based on an assumption that the Board will prescribe a lower price some time in the future.

VERIFICATION

I, Mauricio Gutierrez, verify under penalty of perjury that I have read the foregoing Verified Statement, that I know the contents thereof, and that the same are true and correct to the best of my knowledge. Further, I certify that I am qualified and authorized to file this statement.

A handwritten signature in black ink, appearing to read 'MTC', is written over a horizontal line.

Mauricio Gutierrez

**VERIFIED STATEMENT OF
VIRGINIA FARROW**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NRG POWER MARKETING LLC)	
)	
Complainant,)	
)	
v.)	Docket No. NOR 42122
)	
CSX TRANSPORTATION, INC.)	
)	
Defendant.)	

VERIFIED STATEMENT OF VIRGINIA FARROW

1. My name is Virginia Farrow. I am the Director, Coal Transportation, NRG Energy, Inc., 211 Carnegie Center, Princeton, New Jersey. NRG Power Marketing LLC ("NRG") is a wholly owned subsidiary of NRG Energy, Inc. ("NRG Energy"). I have been an employee of NRG Energy since October 2006. I am responsible for commercial activities related to NRG Energy's coal transportation portfolio; shipment of approximately 28 million tons of coal to NRG Energy's coal-fired generating assets, including transportation of coal to NRG Energy's Huntley Generating Station, located in Tonawanda, New York and to NRG Energy's Dunkirk Generating Station, located in Dunkirk, New York; coal inventory across NRG Energy's coal-fired generating assets; and management of NRG Energy's fleet of 6,200+ private rail cars.

The Huntley Station is a 380-megawatt coal-fired generating station which has in the past consumed approximately 1,500,000 tons of coal per year. The Huntley Station can generate power to supply about 300,000 households. The Dunkirk Generating Station is a 530-megawatt coal-fired generating station which has in the past consumed approximately 2,000,000 tons of

coal per year. The Dunkirk Station can generate power to supply about 420,000 households. I am submitting this Verified Statement in support of NRG's petition for injunctive relief against CSX Transportation, Inc. ("CSXT") in this proceeding, in which NRG requests that CSXT be enjoined from charging its common carrier rates published for coal transportation from Chicago, IL to the Huntley and Dunkirk Stations during the pendency of this proceeding.

2. NRG Energy is a wholesale power generation company with a significant presence in major competitive power markets in the United States. NRG Energy is engaged in the ownership, development, construction and operation of power generation facilities, the transacting in and trading of fuel and transportation services, and the trading of energy, capacity and related products in the regional markets in the United States and select international markets where its generating assets are located. NRG Energy owns and operates the Huntley and Dunkirk Generating Stations, coal-fired electric generating stations located in western New York, whose fuel is transported by CSXT. NRG is the entity that engages in contracts with the railroads and is the initial payor of the freight costs for the transportation of coal to Huntley and Dunkirk. In the remainder of my Verified Statement, I will simply use the term "NRG" to describe both NRG Power Marketing LLC and NRG Energy, Inc.

3. For the past six years, coal for the Huntley and Dunkirk Stations has originated in the Powder River Basin ("PRB") in Wyoming. From the PRB, the coal is transported in unit trains to Chicago, IL by the Union Pacific Railroad Company ("UP"), a distance of about 1150 miles, depending on the origin mine. From Chicago, CSXT transports the unit trains to the Huntley Station, a distance of approximately 525 miles, and to the Dunkirk Station, a distance of approximately 475 miles. Thus, for Huntley, CSXT transports the coal about 31% of the total

movement, while for Dunkirk, CSXT transports the coal 29% of the total movement. CSXT is the only rail carrier that serves either the Huntley or the Dunkirk Stations.

4. From late 2003 until March 31, 2010, coal was transported to the Huntley and Dunkirk Stations by rail from the PRB under a joint contract between NRG, on the one hand, and the UP and CSXT, on the other. As of March 31, 2010, the rates in that joint line contract totaled [[REDACTED]] to the Huntley and Dunkirk Stations for the UP and CSXT combined haul from Wyoming to the Stations, including the fuel surcharge. NRG did not and does not know the divisions between UP and CSXT for that recently-expired contract.

5. Between January 2009 and March 2010, NRG and the rail carriers engaged in negotiations over the terms of a new joint contract to replace the contract that expired on March 31, 2010. Such negotiations consisted of multiple written proposals, verbal offers, face to face meetings, written communications, and conference calls. However, the parties were unable to reach an agreement on a joint contract.

6. On February 19, 2010, NRG entered into a contract with the UP for the transportation of coal in unit-train service from the PRB to the interchange with CSXT at Chicago, effective as of April 1, 2010. The new UP contract base rate is [[REDACTED]] plus fuel surcharges of roughly [[REDACTED]] for the UP's 1150-mile movement from the PRB to Chicago. Contract negotiations continued separately, but unsuccessfully, with CSXT through mid-May 2010.

7. Since January 2009, I have informed CSXT that the Huntley and Dunkirk Stations were "merchant" plants that did not have an obligation to serve load, meaning the market for electric output was predicated upon, among other things, delivered fuel costs. Additionally, unlike traditional regulated utilities, there is no mechanism or fuel clause that allows NRG to

pass increased fuel costs on to rate payers. I also informed CSXT that the market for electric generation from the Huntley and Dunkirk Stations was extremely competitive for the next several years and that rates at excessive levels would cause the Stations to drastically curtail output [[REDACTED]] NRG continued to discuss the deterioration of the New York power market with CSXT through late April.

8. After additional negotiations with CSXT failed to result in an agreement for transportation from Chicago to the destinations, on March 11, 2010, NRG requested from CSXT, under AAR Accounting Rule 11, common carrier tariff rates for these movements, effective April 1, 2010.

9. In response to NRG's request for the common carrier tariff rates, on March 25, 2010, CSXT provided the common carrier Rule 11 tariff rates, at a level of \$28 per ton to the Huntley Station and \$27 per ton to the Dunkirk Station. In other words, effective April 1, 2010, the tariff rates quoted by CSXT for just the approximately 500-mile CSXT portion of the movement (which is only about 30% of the total movement of about 1650 miles between the origin and the two destinations) were [[REDACTED]] of the rate for the total movement from Wyoming to each generating station under the contract that expired on March 31. For another point of comparison, the new UP rate to haul from the PRB to Chicago is [[REDACTED]] The CSXT tariff is [[REDACTED]] of the new UP contract, even though the length of UP's haul from the PRB to Chicago is at least double that of CSXT's haul from Chicago to the Stations.

10. NRG is captive to CSXT for rail service provided to both the Huntley and Dunkirk Stations. The massive rate increase proposed by CSXT indicates that there is no effective competition from any other rail carrier or any other mode of transportation. In fact,

since April 1, 2010, when CSXT's rate increase to the Huntley and Dunkirk Stations took effect, one unplanned train loaded on April 6 and has been transported to the Station. This train remains loaded on site at Huntley because NRG did not envision using the rates in the CSXT—10048 Tariff any time soon, and there is no need for NRG to empty the coal cars. Additionally, the Stations have generated minimal electricity since April 1, 2010, as detailed by other witnesses. The fact that the Stations have virtually shut down in the face of these increases indicates clearly that no effective competition exists from any other rail carrier or mode.

11. CSXT is the only rail carrier that serves the Huntley Station, and is similarly the only rail carrier that serves the Dunkirk Station. Thus, NRG has no alternative to CSXT for rail transportation for the two movements at issue.

12. Truck transportation from Chicago or to another point served by another carrier is not feasible for either Station, given the millions of tons of coal required and the fact that trucks would have to traverse developed areas on public streets.

13. Both the Dunkirk and Huntley Stations are located on waterways; however, vessel transportation is not a feasible option at either Station. Although vessel transportation was used in late 2003, 2004 and 2005 to deliver a small portion of the coal destined for both Stations, the amount of coal delivered by vessel for the past six years, since NRG Energy emerged from bankruptcy in December of 2003, has totaled less than 4% of the total amount of coal delivered to the Stations over that period of time. The following chart lists the vessel and total coal deliveries at both the Dunkirk and the Huntley Stations since 2004.

	Vessel to Huntley*	Vessel to Dunkirk*	Total to Huntley	Total to Dunkirk	Total Coal	Vessel as % of Total
2004**	225,027	500,428	1,670,361	1,860,229	3,530,590	20.5%
2005	31,363	14,396	1,425,851	1,829,582	3,255,433	1.4%
2006	-	-	1,668,339	2,075,183	3,743,522	0.0%
2007	-	-	1,650,774	2,082,582	3,733,356	0.0%
2008	-	-	1,472,006	2,460,883	3,932,889	0.0%
2009	-	-	1,144,803	1,724,882	2,869,685	0.0%
TOTAL	256,390	514,824	9,032,134	12,033,341	21,065,475	3.7%

* Portions of 2004 Great Lakes shipments were not delivered to Dunkirk and Huntley until 2005 due to Lake closure.

** NRG emerged from bankruptcy in December 2003. Shipment records prior to that time are not available.

Shipments throughout 2004 supported gradual phase in of PRB and phase out of Central and Northern Appalachian coals.¹ Due to inventory challenges caused by the average 100+ day Great Lakes closure and other reasons, all of which are discussed further below, NRG ceased deliveries via lake vessel in early 2005 because they could not meet NRG's transportation needs.

14. The Dunkirk Station is located on a very restricted site of land just north of Dunkirk, New York, on Lake Erie. The Dunkirk Station Port is a private port facility within the Dunkirk Harbor area. Although the Station has had some vessel deliveries in the past, even when vessel delivery was possible the Station could not physically obtain more than a portion of its total coal requirements by vessel. Dunkirk has a 35-day storage capacity on site. Inventory capacity is based upon the maximum amount of coal the Station could consume in a 24 hour

¹ NRG entered into a Consent Decree with the State of New York in January 2005. See NRG Energy 2007 Form 10K (p. 28). The Consent Decree settled a 2002 lawsuit filed by the State of New York against NRG alleging that the previous owner of the Stations had made major modifications while failing to install the necessary pollution controls. The Consent Decree required installation of new pollution controls, switching to cleaner burning low-sulfur coal (such as PRB), and retiring the four oldest and most inefficient units at the Huntley Station. After filing of the 2002 lawsuit NRG began major modification work at both Stations to convert them from consuming higher sulfur Central and Northern Appalachian coals to lower sulfur PRB coals. Initial transportation of PRB coal was done via vessel and was done in anticipation of completion of modifications necessary to convert to PRB fuel.

period. During periods of peak demand (December–March and July–August), the Station can consume close to the maximum amount every day. The Great Lakes are closed every winter by the Coast Guard, generally from mid-November through March, depending upon weather conditions. The closure of the Great Lakes to shipping during the Station's peak generating period would result in the Station running out of coal while the Lakes were still closed. Dunkirk could consume the entire stock pile and still have 80-90 days before the Lakes reopened and shipments could resume. Without coal for the Station's boilers, no electricity could be generated.

15. The Dunkirk Station Port was officially closed on January 8, 2008, as confirmed in a letter from the U. S. Coast Guard. See attached Exhibit 1 (Note: the date on the U.S. Coast Guard letter is incorrect; the actual date was January 8, 2008). Depth of the Dunkirk Harbor is well below the 20 feet required to receive a vessel loaded up to approximately 15,000 tons, which is significantly less than the vessel's capacity. The Army Corps of Engineers irregularly dredges in the Dunkirk Harbor but such dredging follows no particular schedule and does not correlate to the degree of silting in the area. The most recent dredging in the Dunkirk Harbor occurred during the fourth quarter of 2009 as a result of the federal legislation adopted in the House Energy and Water Bill in 2009. Prior to 2009, the harbor was last dredged in 2004. After the 2009 dredging, the channel depth at Dunkirk Harbor now varies between 12 and 17 feet, but this is still insufficient for safe operation of empty coal vessels, which need at least 16-feet through the entire channel, let alone loaded coal vessels carrying up to 15,000 tons, which need a channel of 20-foot depth. The Dunkirk Harbor is used by smaller commercial vessels as well as recreational watercraft that are not affected by the reduction in channel depth due to silting.

16. The situation at the Huntley Station is even more restricted for vessel deliveries, and the Station has had even fewer vessel deliveries over the past six years than Dunkirk. Like Dunkirk Station, the Huntley Station Port is a private port facility within the Huntley Harbor area. Although the Huntley Station is located on the Black Rock Channel, an extension of the Erie Canal north of Buffalo, all coal deliveries would have to traverse the Black Rock Lock, which restricts the length, width and time available to vessels that conceivably could be used. I have researched the Great Lakes Fleet. Out of the approximately 200 vessels in the Great Lakes Fleet, there are only two U.S.-flagged vessels suitable for coal on the Great Lakes that could physically fit through the lock.² Several times that number would be needed to supply the Station with coal by vessel. In addition to this restriction, the Huntley Station has only a 50-day storage capacity, far too small to provide for coal to the Station over the three plus month lake closure.

17. Similar to Dunkirk, inventory capacity at Huntley is based upon the maximum amount of coal the Station could consume in a 24 hour period. During periods of peak demand (December – March and July – August), the Station can consume close to the maximum amount every day. The Great Lakes are closed every winter by the Coast Guard, generally from mid-November through March, depending upon weather conditions. The closure of the Great Lakes to shipping during the Station's peak generating period would result in the Station running out of coal while the Lakes were still closed. The Station could consume the entire stock pile and still have 65-75 additional days before the Lakes reopened and shipments could resume. Without coal for the Station's boilers, no electricity could be generated. In light of these constraints, the

² Under the Jones Act, only U.S.-flagged vessels may be used by NRG to deliver coal to the Huntley and Dunkirk Stations.

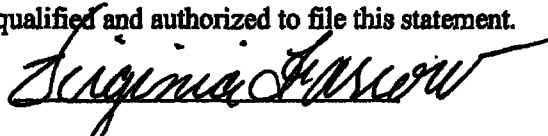
Huntley Port was officially closed as confirmed by correspondence from the U. S. Coast Guard dated May 6, 2008. See attached Exhibit 2.

18. Since April 1, 2010, NRG has shipped one coal train under CSXT Tariff 10048 tariff, and that train loaded only because of a late arrival at the origin mine. NRG estimates that it will consume less than [[REDACTED]] of coal at the two Stations April – December 2010, and will consume less than [[REDACTED]] of coal in calendar year 2011, because it cannot generate power at prices that permit it to sell electricity in the current market. As noted in Witness Evans's verified statement, the delivered price of coal is the key variable that determines whether a generating unit will generate electricity. As NRG's delivered price of coal is not competitive under CSXT's existing Tariff, consumption projections have dropped significantly, a decrease of approximately [[REDACTED]] from April 2010 through December 2011. Inventory at both Stations will support projected generation needs through most of 2011 if the CSXT Tariff remains in effect, meaning no coal is likely to be shipped at the current rate levels before late Q3 2011.

19. As discussed in more detail in the Verified Statement of Witness Evans, NRG further requests that CSXT be permitted to charge rates of \$16.68 per ton to Dunkirk and \$18.26 per ton to Huntley, inclusive of fuel surcharges, for the movement of coal from Chicago, IL, allowing the Stations to compete in the New York power generation market.

VERIFICATION

I, Virginia Farrow, verify under penalty of perjury that I have read the foregoing
Verified Statement, that I know the contents thereof, and that the same are true and correct to the
best of my knowledge. Further, I certify that I am qualified and authorized to file this statement.


Virginia Farrow

U.S. Department of
Homeland Security

United States
Coast Guard



Commander
United States Coast Guard
Sector Buffalo

1 Furhmann Blvd
Buffalo, NY 14203
Phone: (716) 843-8581
Fax: (716) 843-8571

SSIC 16000
Date: January 08, 2007
MISLE Activity #: 3124138
FIN #: NRGDunkirk

NRG Dunkirk
106 Point Drive North
Dunkirk, NY 14048

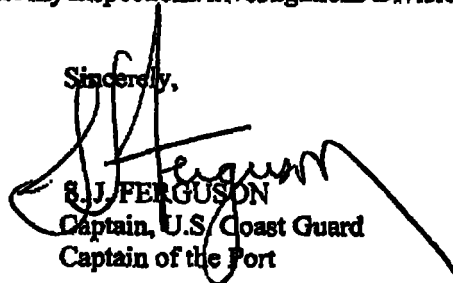
Dear Mr. Heftl:

I have received your letter dated December 31, 2007, wherein you requested a waiver from the requirements of Title 33 part 105 of the Code of Federal Regulations (33 CFR 105). I understand that your facility no longer plans to receive vessels at its dock due to the inadequate depth of the channel. After careful review and consideration, your request is APPROVED.

I ask your continued cooperation with this office to ensure physical security of your facility remains adequate, as it remains subject to the provisions of 33 CFR parts 101 and 103. You are reminded that any change to the operational status of the dock facility requires immediate notification to this office. Please maintain a copy of this letter at your facility so it may be made available to Coast Guard Inspectors upon request.

If you have any questions, please contact my Inspections/Investigations Division staff at the above telephone number.

Sincerely,

A handwritten signature in black ink, appearing to read "S.J. Ferguson".
S.J. FERGUSON
Captain, U.S. Coast Guard
Captain of the Port

U.S. Department of
Homeland Security

United States
Coast Guard



Commander
United States Coast Guard
Sector Buffalo

1 Furthmann Blvd
Buffalo, NY 14203
Phone: (716) 843-9525
Fax: (716) 843-9571

SSIC: 16000
Date: May 13, 2008
MISLE Activity #: 3205570
FIN #: 100064969

NRG Huntley
Attention: Art Ridler
3500 River Rd
Tonawanda, NY 14150

Dear Mr. Ridler:

I have received your letter dated May 6, 2008, wherein you requested a waiver from the requirements of Title 33 part 105 of the Code of Federal Regulations (33 CFR 105), since your facility no longer plans on receiving vessels at its dock. After careful review and consideration, your request is **APPROVED**.

I ask for your continued cooperation with this office to ensure that physical security of your facility remains adequate; as it remains subject to the provisions of 33 CFR parts 101 and 103. You are reminded that any change to the operational status of the dock facility requires immediate notification to this office. Please maintain a copy of this letter at your facility so it may be made available to the Coast Guard Inspectors upon request. If you have any questions, please contact MST1 Joshua Reinhard at (716)843-9332 or email at Joshua.L.Reinhard@uscg.mil.

Sincerely,

A handwritten signature in dark ink, appearing to read "J.A. Boudrow".

J.A. BOUDROW
Commander, U.S. Coast Guard
Chief, Prevention Department

**VERIFIED STATEMENT OF
J. ANDREW MURPHY**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NRG POWER MARKETING LLC)	
)	
Complainant,)	
)	
v.)	Docket No. NOR 42122
)	
CSX TRANSPORTATION, INC.)	
)	
Defendant.)	
)	

VERIFIED STATEMENT OF J. ANDREW MURPHY

1. My name is J. Andrew Murphy. I am Executive Vice President and Regional President, Northeast, NRG Energy, Inc., 104-3 Carnegie Center, Princeton, New Jersey. NRG Power Marketing LLC ("NRG") is a wholly owned subsidiary of NRG Energy, Inc. ("NRG Energy"). As an officer of NRG Energy, I have a fiduciary responsibility to NRG Energy's shareholders. In my current role as the senior executive of the Northeast region, I have the responsibility for the overall performance of the region including managing the financial results. I have previously served as NRG Energy's EVP and General Counsel. I am submitting this Verified Statement in support of NRG's petition for injunctive relief against CSX Transportation, Inc. ("CSXT") in this proceeding and to present facts related to the potential actions management is considering to stop the financial losses that will be suffered by NRG as a result of the imposition by CSXT of tariff rates effective April 1, 2010; and the irreparable harm that such tariff rates will cause NRG.

2. NRG Energy is a wholesale power generation company with a significant presence in major competitive power markets in the United States. NRG Energy is engaged in

the ownership, development, construction and operation of power generation facilities, the transacting in and trading of fuel and transportation services, and the trading of energy, capacity and related products in the regional markets in the United States and select international markets where its generating assets are located. NRG Energy owns and operates the Huntley and Dunkirk Generating Stations, coal-fired electric generating stations located in western New York, whose fuel is transported by CSXT. NRG is the entity that engages in contracts with the railroads and is the initial payor of the freight costs for the transportation of coal to Huntley and Dunkirk. In the remainder of my Verified Statement, I will simply use the term “NRG” to describe both NRG Power Marketing LLC and NRG Energy, Inc.

3. In 2010, EBITDA (Earnings Before Interest Taxes Depreciation and Amortization) at both Huntley and Dunkirk will be reduced due to multiple economic factors. One of the primary factors is attributed to lower unit dispatch partially driven by the increased CSXT coal transportation cost. NRG manages its business performance based on EBITDA because it is the best indicator of the operational profitability of its facilities and removes the impact of financing, tax, and key non-cash items. By granting injunctive relief, this will greatly assist in reducing the currently anticipated EBITDA losses projected for the Huntley and Dunkirk Stations over the next few years. In order to maximize shareholder value, the NRG regional management team is actively reviewing and planning the implementation of one or more alternative strategies to minimize the projected financial losses for Huntley and Dunkirk.

[[[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]]

4. [[[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]]

5. The harm to NRG from the CSXT Tariff 10048 is irreparable. I understand if NRG prevails in its complaint proceeding before the STB, NRG would obtain reparations for the difference between the tariff rate that NRG has paid and the level that the Board determines to be a "reasonable" rate during the pendency of the litigation. I also understand that the Board will prescribe a reasonable rate for a ten-year period for the future. However, NRG's reparations will

be inadequate, because NRG projects approximately 90,000 tons of coal will be shipped at the rates charged under CSXT's tariff through 2011. I understand that reparations paid by CSXT cannot include a payment to NRG that would compensate for costs associated with implementing

[[[REDACTED]

[REDACTED]]] Reparations will therefore be inadequate. NRG cannot simply ignore the price that CSXT is charging for transporting the coal now and over the coming year or more and incur negative EBITDA by assuming that the Board will prescribe a lower price some time in the future.

VERIFICATION

I, J. Andrew Murphy, verify under penalty of perjury that I have read the foregoing Verified Statement, that I know the contents thereof, and that the same are true and correct to the best of my knowledge. Further, I certify that I am qualified and authorized to file this statement.



J. Andrew Murphy

**VERIFIED STATEMENT OF
THOMAS D. CROWLEY**

<p>NRG POWER MARKETING LLC</p> <p style="text-align: center;">Complainant,</p> <p style="text-align: center;">v.</p> <p>CSX TRANSPORTATION, INC.</p> <p style="text-align: center;">Defendant.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Docket No. NOR 42122</p>
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Date: May 21, 2010

I. INTRODUCTION

My name is Thomas D. Crowley. I am an economist and the President of L.E. Peabody & Associates, Inc., an economic consulting firm that specializes in solving economic, financial, transportation, marketing, and fuel supply problems. I have spent most of my career of over thirty-nine (39) years evaluating fuel supply issues and railroad operations, including railroad costs, accounting, prices, financing, cost of capital, capacity and equipment planing issues. My assignments in these matters were commissioned by railroads, producers, and shippers of different commodities. A copy of my credentials is included as Exhibit No. 1 to this verified statement.

NRG Power Marketing LLC ("NRG") has asked me to estimate the rate to variable cost ("R/VC") ratios and resulting jurisdictional threshold rates associated with CSX Transportation's ("CSXT") Rule 11 tariff rates for transporting NRG's unit coal train traffic from Chicago to the Huntley and Dunkirk power generation stations, located in Tonawanda and Dunkirk, NY, respectively. NRG's coal traffic originates in the Power River Basin ("PRB") in Wyoming and is transported by the Union Pacific Railroad Company ("UP") in unit trains from the PRB to Chicago, where the traffic is interchanged with the CSXT for transportation to the destinations.

My testimony is presented below under the following topical headings:

- A. CSXT Rule 11 Rates Applicable to NRG's Coal Traffic
- B. Revenue to Variable Cost Ratios and Jurisdictional Threshold
- C. CSXT/NRG R/VC Ratios Compared with STB Findings in Previous Rate Proceedings

**A. CSXT RULE 11 RATES
APPLICABLE TO
NRG'S COAL TRAFFIC**

Prior to March 31, 2010, CSXT transported NRG's coal to the Huntley and Dunkirk facilities pursuant to a contract entered between NRG, CSXT and UP. When the parties were unable to reach agreement on new joint contract rates, NRG entered into a rail transportation agreement with the UP for the transportation of coal from the PRB to the Chicago, IL interchange with CSXT.

Because NRG and CSXT could not agree on a proportional rate to be included in a contract, CSXT published common carrier Rule 11 tariff rates covering the movement of NRG coal traffic from CSXT's interchange with UP at Barr Yard in Chicago to the Huntley and Dunkirk plants. The CSXT published rate from Chicago to the Huntley plant equals \$28 per ton and from Chicago to the Dunkirk plant equals \$27 per ton as of April 1, 2010 (tariff CSXT 10048).

**B. REVENUE TO VARIABLE
COST RATIOS AND
JURISDICTIONAL THRESHOLD**

The Surface Transportation Board's ("STB" or "Board") decision in "*Major Issues*"¹ requires parties to maximum rate proceedings to determine each issue movement's regulatory variable cost of service using unadjusted Uniform Railroad Costing System ("URCS") variable costs as developed using the URCS Phase III costing model.² Pursuant to the STB's *Major Issues* decision, I have calculated the variable costs for each of NRG's issue movements using

¹ Ex Parte 657 (Sub-No. 1), *Major Issues in Rail Rate Cases*, served October 30, 2006 ("*Major Issues*").

² See *Major Issues* at 47.

the STB's 2008 CSXT URCS Phase III model. The STB's 2008 CSXT URCS Phase III costing model that I used was developed by the STB using the most current cost information available, and therefore reflects the best estimate of regulatory variable costs of service. The resulting regulatory variable costs were indexed to second quarter of 2010 ("2Q10") wage and price levels.

The STB's URCS Phase III model requires nine inputs. I developed eight of the required nine inputs – operating railroad, shipment type, freight cars per shipment, railcar type, railcar ownership, tons per car, commodity and type of movement – based on historic movement data provided by NRG. I calculated the remaining input for the model, loaded movement miles, for each movement using ALK Technologies PC* Mile/Rail program, Version 16.0 ("PC Rail").

I indexed the 2008 CSXT URCS variable cost calculations to 2Q10 price levels through a combination of American Association of Railroads' ("AAR") Rail Cost Recovery ("RCR") indices and the Bureau of Labor Statistics ("BLS") Producer Price Index for All Commodities ("PPIAC") through 1Q10. The STB's 2Q10 components from the Rail Cost Adjustment Factor were used as surrogates for the AAR's RCR indices for 2Q10 for all cost inputs, except the "Other Indexable Expenses" component. The "Other Indexable Expenses" component was adjusted by the PPIAC. Specifically, I relied upon the change in the PPIAC as published in the Energy Information Administration's May 2010 Short Term Energy Outlook from 1Q10 to 2Q10. The change was applied to the actual 1Q10 "Other Indexable Expenses" component to estimate the 2Q10 "Other Indexable Expenses" component.

As of 2Q10, I calculated the regulatory variable cost for the movement of coal on CSXT from Chicago to the Huntley plant to be \$7.61 per ton and the CSXT regulatory variable cost for

the movement of coal to the Dunkirk plant to be \$6.95 per ton. The CSXT variable costs that I calculated for each plant, compared to the CSXT tariff rates to the Huntley and Dunkirk plants effective April 1, 2010, produces a R/VC ratio of 368%³ for the Huntley plant and a R/VC ratio of 388%⁴ for the Dunkirk plant.

The STB's jurisdictional threshold rates (i.e., 180 percent of variable cost) for CSXT's movement of coal from Chicago to the Huntley plant equals \$13.70 per ton and from Chicago to Dunkirk equals \$12.51 per ton at 2Q10 wage and price levels.

**C. CSXT/NRG R/VC RATIOS
COMPARED WITH STB
FINDINGS IN PREVIOUS
RATE PROCEEDINGS**

The R/VC ratios produced by CSXT's rates for the two NRG moves are substantially higher than any of the R/VC ratios produced in any recent maximum reasonable rate proceeding involving the efficient movement of unit coal trains. This section of my verified statement compares the R/VC ratios for the NRG unit coal train moves to the R/VC ratios found for maximum reasonable rates prescribed by the STB in recent maximum unit coal train maximum rate decisions.

Specifically, I identified the maximum R/VC ratios for STB prescribed rates in several recent maximum coal rate proceedings involving the movement of PRB coal in unit train service. In some of these proceedings, the parties agreed that the rate should be set at the jurisdictional threshold, and in others the Board prescribed a rate based on the stand-alone cost constraint. Rates were prescribed at the greater of stand-alone cost or the jurisdictional threshold of 180% of

³ CSXT Rule 11 rate of \$28 per ton ÷ CSXT variable cost of \$7.61 per ton.

⁴ CSXT Rule 11 rate of \$27 per ton ÷ CSXT variable cost of \$6.95 per ton.

variable cost. Even where the STB prescribed rates based on the stand-alone cost constraint, the prescribed rates produced R/VC ratios which are significantly lower than the R/VC ratios produced by the CSXT rates for the two moves evaluated in this verified statement.

Table 1 below shows the 2010 R/VC ratios for all prescribed rates in maximum rate coal proceedings involving the movement of PRB coal in unit train service beginning in the year 2004.

STB Docket No. (1)	Shipper (2)	Decision Served (3)	2010 R/VC Ratio (4)
1. 42056	TMPA 1/	October 29, 2004	180% 6/
2. 42057	Xcel 2/	May 3, 2005	194% 7/
3. 42095	KCPL 3/	May 19, 2008	180%
4. 42088	WFA 4/	June 5, 2009	245%
5. 42111	OGE 5/	October 26, 2009	180%
<p>1/ STB Docket No. 42056, <i>Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company</i>, served October 29, 2004 ("TMPA").</p> <p>2/ STB Docket No. 42057, <i>Public Service Company of Colorado D/B/A Xcel Energy v. BNSF Railway Company</i>, served May 3, 2005 ("Xcel").</p> <p>3/ STB Docket No. 42095, <i>Kansas City Power & Light Company v. Union Pacific Railroad Company</i>, served May 19, 2008 ("KCPL").</p> <p>4/ STB Docket No. 42088, <i>Western Fuels Association, Inc. And Basin Electric Power Cooperative v. BNSF Railway Company</i>, served June 5, 2009 ("WFA").</p> <p>5/ STB Docket No. 42111, <i>Oklahoma Gas & Electric Company v. Union Pacific Railroad Company</i>, served October 6, 2009 ("OGE").</p> <p>6/ STB's prescribed SAC rate for 2010 divided by BNSF URCS Phase III regulatory variable costs for 2010 produced a R/VC ratio less than 180%. For purposes of his analysis, I used 180%.</p> <p>7/ STB's prescribed SAC rate for 2010 divided by BNSF URCS Phase III regulatory variable costs for 2010.</p>			

As shown in Table 1 above, even the highest prescribed maximum reasonable rate at 2010 levels where the stand-alone cost constraint was used by the STB in any of these coal

proceedings, is 245% which is substantially below the R/VC ratios produced by CSXT's rates for the two movements at issue here, i.e., 368% for Huntley and 388% for Dunkirk.

The R/VC ratios in Table 1 above represent STB findings in maximum reasonable rate decisions during the last five years involving the movement of PRB coal in unit train service. The R/VC ratios range from 180% for unit coal train movements of over 1,000 miles (KCPL, OGE and TMPA) to 245% for unit coal train movements of a few hundred miles (WFA and Xcel).

When the Table 1 2010 R/VC ratios are applied to CSXT 2Q10 URCS Phase III variable costs for the Huntley and Dunkirk movements, the anticipated maximum rates are shown on Line 2 of Table 2 below.

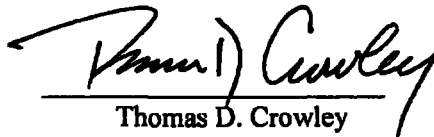
<p align="center">Table 2 CSXT Rates To Huntley/Dunkirk Based On Prior STB Maximum Rate Decisions – 2010</p>		
<u>Item</u> (1)	<u>Huntley</u> (2)	<u>Dunkirk</u> (3)
1. CSXT Rule 11 Rate (4/1/10)	\$28.00	\$27.00
2. 2010 Rate Assuming R/VC Ratio From The Following STB <u>Maximum Rate Proceeding:</u>		
a. <i>TMPA</i> (180% 1/)	\$13.70	\$12.51
b. <i>Xcel</i> (194% 1/)	\$14.76	\$13.48
c. <i>KCPL</i> (180% R/VC)	\$13.70	\$12.51
d. <i>WFA</i> (245% R/VC)	\$18.64	\$17.03
e. <i>OGE</i> (180% R/VC)	\$13.70	\$12.51
<p>1/ The STB prescription for this movement was based on the percent reduction methodology which was the maximum rate methodology used by the STB prior to adopting the maximum markup methodology ("MMM") R/VC ratio approach in <i>Major Issues</i>. In each of these decisions, the STB calculated a rate prescription on a dollars per ton basis for each year of the prescription time period. I compared the 2010 prescribed rate to the URCS Phase III variable costs at 2Q10 levels for each movement to develop the 2010 R/VC ratios.</p>		

Application of the STB maximum rate findings for captive PRB unit coal movements to the NRG PRB unit coal train movements on CSXT, produces 2010 rate levels that range between \$12.51 per ton and \$18.64 per ton (Table 2, Line 2). By comparison, the CSXT Rule 11 rates range between \$27.00 per ton and \$28.00 per ton (Table 2, Line 1).


VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

I, THOMAS D. CROWLEY, verify under penalty of perjury that I have read the foregoing Verified Statement of Thomas D. Crowley, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.


Thomas D. Crowley

Sworn to and subscribed
before me this 21st day of May, 2010


Diane R. Kavounis
Notary Public for the State of Virginia

My Commission Expires: November 30, 2012
Registration Number: 7160645

STATEMENT OF QUALIFICATIONS

My name is Thomas D. Crowley. I am an economist and President of the economic consulting firm of L. E. Peabody & Associates, Inc. The firm's offices are located at 1501 Duke Street, Suite 200, Alexandria, Virginia 22314, and 760 E. Pusch View Lane, Tucson, Arizona 85737, and 21 Founders Way, Queensbury, New York 12804.

I am a graduate of the University of Maine from which I obtained a Bachelor of Science degree in Economics. I have also taken graduate courses in transportation at George Washington University in Washington, D.C. I spent three years in the United States Army and since February 1971 have been employed by L. E. Peabody & Associates, Inc.

I am a member of the American Economic Association, the Transportation Research Forum, and the American Railway Engineering and Maintenance-of-Way Association.

The firm of L. E. Peabody & Associates, Inc. specializes in analyzing matters related to the rail transportation of coal. As a result of my extensive economic consulting practice since 1971 and my participating in maximum-rate, rail merger, service disputes and rule-making proceedings before various government and private governing bodies, I have become thoroughly familiar with the rail carriers that move coal over the major coal routes in the United States. This familiarity extends to subjects of railroad service, costs and profitability, railroad capacity, railroad traffic prioritization and the structure and operation of the various contracts and tariffs that historically have governed the movement of coal by rail.

STATEMENT OF QUALIFICATIONS

As an economic consultant, I have organized and directed economic studies and prepared reports for railroads, freight forwarders and other carriers, for shippers, for associations and for state governments and other public bodies dealing with transportation and related economic problems. Examples of studies I have participated in include organizing and directing traffic, operational and cost analyses in connection with multiple car movements, unit train operations for coal and other commodities, freight forwarder facilities, TOFC/COFC rail facilities, divisions of through rail rates, operating commuter passenger service, and other studies dealing with markets and the transportation by different modes of various commodities from both eastern and western origins to various destinations in the United States. The nature of these studies enabled me to become familiar with the operating practices and accounting procedures utilized by railroads in the normal course of business.

Additionally, I have inspected and studied both railroad terminal and line-haul facilities used in handling various commodities, and in particular unit train coal movements from coal mine origins in the Powder River Basin and in Colorado to various utility destinations in the eastern, mid-western and western portions of the United States and from the Eastern coal fields to various destinations in the Mid-Atlantic, northeastern, southeastern and mid-western portions of the United States. These operational reviews and studies were used as a basis for the determination of the traffic and operating characteristics for specific movements of coal and numerous other commodities handled by rail.

STATEMENT OF QUALIFICATIONS

I have frequently been called upon to develop and coordinate economic and operational studies relative to the acquisition of coal and the rail transportation of coal on behalf of electric utility companies. My responsibilities in these undertakings included the analyses of rail routes, rail operations and an assessment of the relative efficiency and costs of railroad operations over those routes. I have also analyzed and made recommendations regarding the acquisition of railcars according to the specific needs of various coal shippers. The results of these analyses have been employed in order to assist shippers in the development and negotiation of rail transportation contracts which optimize operational efficiency and cost effectiveness.

I have developed property and business valuations of privately held freight and passenger railroads for use in regulatory, litigation and commercial settings. These valuation assignments required me to develop company and/or industry specific costs of debt, preferred equity and common equity, as well as target and actual capital structures. I am also well acquainted with and have used the commonly accepted models for determining a company's cost of common equity, including the Discounted Cash Flow Model ("DCF"), Capital Asset Pricing Model ("CAPM"), and the Farma-French Three Factor Model.

Moreover, I have developed numerous variable cost calculations utilizing the various formulas employed by the Interstate Commerce Commission ("ICC") and the Surface Transportation Board ("STB") for the development of variable costs for common carriers,

STATEMENT OF QUALIFICATIONS

with particular emphasis on the basis and use of the Uniform Railroad Costing System ("URCS") and its predecessor, Rail Form A. I have utilized URCS/Rail form A costing principles since the beginning of my career with L. E. Peabody & Associates Inc. in 1971.

I have frequently presented both oral and written testimony before the ICC, STB, Federal Energy Regulatory Commission, Railroad Accounting Principles Board, Postal Rate Commission and numerous state regulatory commissions, federal courts and state courts. This testimony was generally related to the development of variable cost of service calculations, rail traffic and operating patterns, fuel supply economics, contract interpretations, economic principles concerning the maximum level of rates, implementation of maximum rate principles, and calculation of reparations or damages, including interest. I presented testimony before the Congress of the United States, Committee on Transportation and Infrastructure on the status of rail competition in the western United States. I have also presented expert testimony in a number of court and arbitration proceedings concerning the level of rates, rate adjustment procedures, service, capacity, costing, rail operating procedures and other economic components of specific contracts.

Since the implementation of the Staggers Rail Act of 1980, which clarified that rail carriers could enter into transportation contracts with shippers, I have been actively

STATEMENT OF QUALIFICATIONS

involved in negotiating transportation contracts on behalf of coal shippers. Specifically, I have advised utilities concerning coal transportation rates based on market conditions and carrier competition, movement specific service commitments, specific cost-based rate adjustment provisions, contract reopeners that recognize changes in productivity and cost-based ancillary charges.

I have been actively engaged in negotiating coal supply contracts for various users throughout the United States. In addition, I have analyzed the economic impact of buying out, brokering, and modifying existing coal supply agreements. My coal supply assignments have encompassed analyzing alternative coals to determine the impact on the delivered price of operating and maintenance costs, unloading costs, shrinkage factor and by-product savings.

I have developed different economic analyses regarding rail transportation matters for over sixty (60) electric utility companies located in all parts of the United States, and for major associations, including American Paper Institute, American Petroleum Institute, Chemical Manufacturers Association, Coal Exporters Association, Edison Electric Institute, Mail Order Association of America, National Coal Association, National Industrial Transportation League, North America Freight Car Association, the Fertilizer Institute and Western Coal Traffic League. In addition, I have assisted numerous government agencies, major industries and major railroad companies in solving various transportation-related problems.

STATEMENT OF QUALIFICATIONS

In the two Western rail mergers that resulted in the creation of the present BNSF Railway Company and Union Pacific Railroad Company and in the acquisition of Conrail by Norfolk Southern Railway Company and CSX Transportation, Inc., I reviewed the railroads' applications including their supporting traffic, cost and operating data and provided detailed evidence supporting requests for conditions designed to maintain the competitive rail environment that existed before the proposed mergers and acquisition. In these proceedings, I represented shipper interests, including plastic, chemical, coal, paper and steel shippers.

I have participated in various proceedings involved with the division of through rail rates. For example, I participated in ICC Docket No. 35585, Akron, Canton & Youngstown Railroad Company, et al. v. Aberdeen and Rockfish Railroad Company, et al. which was a complaint filed by the northern and mid-western rail lines to change the primary north-south divisions. I was personally involved in all traffic, operating and cost aspects of this proceeding on behalf of the northern and mid-western rail lines. I was the lead witness on behalf of the Long Island Rail Road in ICC Docket No. 36874, Notice of Intent to File Division Complaint by the Long Island Rail Road Company.